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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

18 CR 224 (AJN)

5 ALI SADR HASHEMI NEGAD,

6 Defendant

Conference

7 -----x

New York, N.Y.
August 15, 2019
4:15 p.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
Southern District of New York

16 BY: DAVID DENTON

JANE KIM

17 MICHAEL KROUSE

GARRETT LYNCH

18 Assistant United States Attorneys

19 STOPTOE & JOHNSON, LLP

Attorneys for Defendant

20 BY: Reid Weingarten

Brian Heberlig

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(Case called)

THE COURT: Good afternoon. Please be seated.

I will take appearances of counsel, starting with counsel for the government.

MR. DENTON: Good afternoon, your Honor. David Denton, Jane Kim, Michael Krouse on Garrett Lynch for the government.

THE COURT: For the defendant.

MR. WEINGARTEN: Good afternoon, your Honor. Reid Weingarten and Brian Heberlig for the defendant, my client, who is here, Mr. Nejad.

THE COURT: Good afternoon, Mr. Nejad.

Mr. Nejad, I am Judge Nathan. I will be the district judge handling this matter going forward. We're here for a status and scheduling conference following the transfer of this matter to me in light of Judge Carter's recusal in the matter.

I have began to familiarize myself with the docket and existing schedule. What I would like to do is hear a basic status update from the government, talk about what needs to be done to get the matter trial matter and set. I will hear from you on scheduling, but talk about the potential rescheduling of trial in light of where the case is now and what needs to be done to get it trial ready. I am open to a discussion as to what the parties wish to do as to how to proceed.

Mr. Denton.

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1 MR. DENTON: Yes, your Honor.

2 I think there are essentially three categories of
3 areas that need to be resolved before we get to pretrial
4 filings, motions in limine and request for charge and so on.
5 The first is the outstanding Curcio issue pertaining to the
6 conflicts. I am happy to elaborate on what I think needs to be
7 done at this stage. If your Honor would like, we can talk at a
8 higher level.

9 Second, is the pretrial motions which were briefed but
10 no oral argument was set. I don't know if the Court is going
11 to want that.

12 THE COURT: One of the motions is a suppression
13 motion, but the government hasn't consented to a hearing; is
14 that right?

15 MR. DENTON: That's correct, your Honor.

16 THE COURT: So potentially the need for a hearing?

17 MR. DENTON: Yes, that's true as well.

18 There is then some bleed over between the pretrial
19 motions and the last category of dispute to be addressed, which
20 are privilege questions. The reason I say that is that the
21 defendant's last pretrial motion was styled in the first
22 instance as a motion for the return of property for certain
23 unresponsive emails. In his reply brief, the defendant makes
24 an application to the Court for the first time precluding the
25 government from reviewing emails even if his return of property

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1 motion is rejected. That is not something obviously that was
2 made in the first instance but the government has responded to.
3 Your Honor is obviously quite familiar with these issues from
4 the *United States v. Benson Wade* case. I expect if that is
5 going to be an issue, it is going to be a separate motion
6 practice that needs to get addressed before the privilege
7 review. Because one of the issues we have run into with the
8 privilege review is what universe of documents the filter team
9 on the government side should even be allowed to look at for
10 purposes of making privilege determinations.

11 So I think those three categories need to be handled
12 in sequence.

13 THE COURT: Why don't you drill down on each category
14 then with your suggestions for process that needs to be
15 scheduled out that hasn't. Recognizing that the primary set of
16 motions have been fully briefed, but what your proposal is for
17 what process remains to be determined.

18 MR. DENTON: Yes, your Honor.

19 So with respect to a *Curcio*, we are in partially
20 chartered territory here. The only other case in which a
21 conflict situation of this type has arisen was before Judge
22 Berman in *United States v. Zarrab*. The conflict issue arose
23 with respect to two defendants. Judge Berman there adopted a
24 multistep process whereby he required the defendant to -- I
25 should say he required the defense counsel to obtain written

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1 waivers of conflicts from the victim banks at issue, then
2 allocuted the defendant as to the nature of the conflict. The
3 reasons for proceedings that way was that the waivers from the
4 banks included certain limitations on what defense counsel
5 could do, including in one instance the right to review
6 filings; and I think everyone agreed that the defendant needed
7 to be allocuted about limitations with respect to that.

8 The last was that he required there be separate
9 unconflicted counsel as part of the trial team to address
10 issues with respect to the banks. As to the first defendant
11 for whom the issue came up, that wasn't an issue. There
12 already was unconflicted counsel. Defendant was represented by
13 several law firms. With respect to the second defendant, in
14 that case it required the addition of a new lawyer to the
15 defense team.

16 I say we are in partially chartered territory here
17 because the government there took the position that this was a
18 nonwaivable conflict and required disqualification of counsel.
19 We have determined in light of the precedent there that we do
20 not take that view here. We think it is probably a waivable
21 conflict; but what the specific parameters of what is required
22 to make an effective waiver if something different than what
23 Judge Berman did, is not an issue that has been addressed.

24 THE COURT: The government's position now that it is
25 waivable you said is not based on distinguishing facts from in

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1 that instance but because of the precedent set in that matter
2 by Judge Berman?

3 MR. DENTON: Essentially, yes, your Honor. We have
4 not explored whether there would be distinguishing facts, but I
5 think we're accepting that Judge Berman's process was
6 sufficient to satisfy that the defendant's Sixth Amendment
7 rights were protected.

8 THE COURT: The government's proposal would be to
9 proceed in that same order with that same set of protections?

10 MR. DENTON: Yes, your Honor.

11 THE COURT: Why don't we take that one up first, Mr.
12 Weingarten.

13 MR. WEINGARTEN: May I use to podium, your Honor?

14 THE COURT: Sure.

15 MR. WEINGARTEN: Your Honor, in terms the conflict
16 with a potential conflict issue, we really do take the position
17 that this is much adieu about precious little. What we're
18 talking about are the fact that there are four banks and they
19 are clearing banks. In the bookkeeping entries, our client was
20 not a customer at any of these banks. The bank gained I think
21 about \$7 or \$8 per transaction. We learned that these banks
22 can do literally millions of these transactions every day.
23 They take a second. They are just automatic, electronic
24 transfers. They are characterized as "potential victims" in
25 the indictment.

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1 What it really boils down to -- Steptoe and Johnson
2 represents J P Morgan in something completely unrelated. One
3 day there may be a J P Morgan guy or woman on the stand and we
4 will cross-examine that person. We will not know that person.
5 We will never have represented that person. We won't know that
6 person from Adam. We anticipate the enormous bulk of the
7 testimony that they elicit from these banks will be
8 ministerial -- what happened? How did you issue it? What did
9 you do as a clearing bank? Period.

10 I suppose it could get a little more complicated if
11 they attempt to establish materiality -- What would you have
12 done had you know that somewhere along the line Iran was in the
13 background? We are certainly going to object to that testimony
14 as potentially offering a legal opinion; but under any
15 circumstances it is very hard for me to see a real honest to
16 goodness conflict here. Of course our client has been advised
17 about at least the potential notion that we could pull short on
18 our cross-examination because we don't want to offend a client
19 at the other side of the law firm, and I am prepared to address
20 that with the Court today or at any time the Court wishes it to
21 be addressed.

22 With total respect to Judge Berman, I think he went an
23 extra couple of miles. Now, to be sure the facts in *Zarrab* and
24 the banks involved and the law firms' relationship with these
25 banks is completely different and much greater than our

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1 involvement with the banks in this case. It really sort of
2 comes down to whether or not this Court will require a waiver
3 from J P Morgan. To be sure we view ourselves as ethical
4 lawyers and we don't want to be on the wrong side of J P Morgan
5 and we'll engage with them. We'll discuss with them what our
6 relationship with them is and should be.

7 Let's say they don't want our result. They have every
8 opportunity to fire us, to never hire us again, to go to the
9 bar against us. I respectfully suggest it is not an issue that
10 the Court needs to worry about. The Court needs to worry about
11 whether or not the procedure in this courtroom is appropriate,
12 whether or not our client was protected, and whether or not
13 everything is hunky-dory. Whether or not we are crossways with
14 J P Morgan, I don't think is included in the mix.

15 To be sure we will engage with J P Morgan. To be sure
16 we will advise the Court as to where we are on this particular
17 issue. We're very happy for the Court to engage, question our
18 client as to whether or not he fully understands the
19 implications of our being his lawyer and cross-examining the J
20 P Morgan witnesses.

21 THE COURT: You object to the requirement of written
22 waiver from J P Morgan?

23 MR. WEINGARTEN: I don't think it is necessary.

24 THE COURT: That is an answer to a slightly different
25 question.

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1 Do you object to it?

2 MR. WEINGARTEN: Yes.

3 THE COURT: There is a lot of stuff that I do that I
4 don't think is necessary but sometimes I think no harm or
5 better safe than sorry. This seems to me one of those
6 instances.

7 MR. WEINGARTEN: I get that completely and at a bear
8 minimum, I assume the next time we come to court if the Court
9 will address our client on this issue, we would report. If
10 something seems wrong with what is going on J P Morgan, we'll
11 advise the Court and the Court could order us to do anything
12 appropriate.

13 My sense is when you look at the weak case and you
14 look at the case where waivers are required from both parties,
15 it is a situation where the same defense attorney represents
16 two defendants. Obviously you have to get waivers from both
17 where the same defense attorney represents two targets and one
18 flips and one is a defendant and the one who flips is a
19 government witness. When a lawyer wants to cross-examine
20 somebody who he has represented for five years, obviously you
21 have to go and get both waivers. Here, we're talking about J P
22 Morgan somebody -- it really comes down to whether or not we're
23 going to pull our punches with the guy on the stand, somebody
24 we don't know, we have never represented, we have never heard
25 of and we'll have the *Jencks* material. Pure and simple. That

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1 is the story.

2 THE COURT: So let me try one more time. Do you
3 object to a requirement of written waiver?

4 There is so many things I have to decide in a given
5 day. I try to avoid those that I don't. If I do, I do. I
6 haven't read the case you just referred to and I haven't looked
7 carefully at *Zarrab*.

8 So do you object to the written waiver requirement for
9 J P Morgan?

10 MR. WEINGARTEN: Yes.

11 THE COURT: Then I will look at the issue.

12 You obviously don't object to a Curcio hearing.

13 MR. WEINGARTEN: No.

14 THE COURT: And speculating and hypothesizing in front
15 of your client as to the potential conflicts and issues that
16 may arise.

17 What about unconflicted trial counsel?

18 MR. WEINGARTEN: What about?

19 THE COURT: The third process Mr. Denton tells me from
20 *Zarrab* was the I suppose requirement of addition of
21 unconflicted counsel.

22 MR. WEINGARTEN: That is really the issue when you get
23 down to it. In *Zarrab*, Ben Brafman was co-counsel to the firm
24 and he was there and the bank was okay with his cross-examining
25 the witness because he didn't represent the bank. We don't

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1 have another law firm. It just seems like a cumbersome process
2 that should not be required. We're anticipating that is the
3 worst case. As a matter of principle, the bank is okay with
4 someone from a law firm that was not presently representing and
5 cross-examining the witness in *Zarrab*. It is very like that
6 that would be satisfactory here. That seems to us to be the
7 worst case unnecessary.

8 THE COURT: Mr. Denton, did I interpret you right that
9 the government's position is that to ensure a knowing waiver
10 and protection of the defendant's rights that I should require
11 each of the three things you enumerated; is that the
12 government's position?

13 MR. DENTON: I think it is the government's position
14 that that would certainly suffice. I think if the Court were
15 inclined to explore something else, we're operating like I said
16 with a precedent universe of one here. If we were going to
17 explore other options, we certainly --

18 THE COURT: To move to the third category, there is
19 not presently any counsel from a firm other than Steptoe. So
20 the question is: Is it the government's position that that
21 would be necessary?

22 MR. DENTON: If I could have a moment, your Honor.

23 (Pause)

24 MR. DENTON: Again, your Honor, recognizing that we're
25 operating with a limited universe of precedent here, we think

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1 the answer is yes, that it should be required.

2 MR. WEINGARTEN: Can I make a suggestion here?

3 THE COURT: Sure.

4 MR. WEINGARTEN: What we will do irrespective of what
5 happens in court is engage with J P Morgan. We'll have a
6 conversation with them. In the course of the conversation,
7 they may say this is what we prefer: We may prefer that you
8 engage another law firm to cross-examine our guy. We may agree
9 or we may not agree. What I respectfully ask today is the
10 opportunity to do that and come back to the court next time
11 we're here and report. The issue may be completely mooted by
12 that conversation.

13 THE COURT: Why don't we do this, why don't we set a
14 date for a Curcio hearing. We'll set a date for some period
15 before that in which hopefully you'll submit a joint letter
16 indicating your agreement as to how to proceed.

17 MR. WEINGARTEN: Yes.

18 THE COURT: I will make sure that the third person at
19 the party, me, agrees as well. Or if you disagree, you'll
20 write your basis for your separate suggestions as to how to
21 proceed. I will ask with that also for purposes of the Curcio
22 hearing the government to submit a proposed script or whatever
23 you want to submit in light of the -- you can submit the
24 transcript from *Zarrab* I suppose if that is the basis for the
25 suggestion as to how to proceed.

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1 When would you like to do the Curcio?

2 MR. WEINGARTEN: I guess working backwards, I think a
3 lot of this will depend on when the trial date is. Can we do
4 it that way and work backwards?

5 THE COURT: Well, we can try that. I want to see
6 where you are in terms of that. From my perspective I will
7 make room on the calendar. The question is what needs to be
8 done and realistically can get done between now and trial in
9 light of this landing on me unexpectedly. Depending on what
10 the parties' position is as to when we should proceed to trial,
11 we might be able to resolve that and work backwards.

12 What is the request and proposal in that regard?

13 MR. WEINGARTEN: For the hearing or for the trial?

14 THE COURT: For the trial.

15 MR. WEINGARTEN: So the trial date is October 21st.
16 We have cleared our decks and we anticipated that would be the
17 trial. Mr. Heberlig has a trial March 2nd. I had a trial
18 tragically that is not going to happen now. I have a potential
19 trial next year. So we're comfortable moving it back some, but
20 we would like it this year.

21 THE COURT: Would you include January in this year?

22 MR. WEINGARTEN: We much prefer December if that is
23 possible.

24 MR. HEBERLIG: Can I address that, your Honor.

25 THE COURT: Go ahead.

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1 MR. HEBERLIG: Your Honor, the issue with January is
2 my other trial that starts March 2nd. It involves a lot of
3 foreign evidence. The judge in that case, which is the Western
4 District of Washington, has reserved the month of January for
5 the parties to take Rule 15 depositions. Our cutoff for taking
6 those depositions is the end of January. I anticipate the bulk
7 of the mouth of January I will be in Asia taking trial
8 depositions. It is effectively a trial because the way it is
9 structure.

10 THE COURT: My concern with December is the resolution
11 of what I see as nine pending fully briefed undecided motions.
12 I imagine that this crowd will have some in limine motions. I
13 have a three-week criminal trial beginning December 2nd, which
14 almost certainly will go. So that is the reality of where I
15 am. If I thought for sure we could be trial-ready by December,
16 I would see what I could do. I would potentially ask a
17 colleague to cover one of the two trials because we have to get
18 to trial when folks want it and it is a priority on the docket.
19 That is just the reality of both what needs to be done and the
20 Court's schedule and your schedules.

21 January it sounds like it is difficult. I will tell
22 you that February has its only problems. Again, we can make it
23 work. March looks beautiful and certainly would ensure us the
24 time to get it done. As I say, we can make things work when
25 cases are ready to go to trial.

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1 MR. WEINGARTEN: Can I just ask for information
2 purposes about November?

3 THE COURT: November. It seems unlikely that we'll be
4 trial-ready in November. Highly unlikely. You have asked for
5 a Franks hearing. I have only flipped through the pages of the
6 motions. They are going to take some time to resolve. As I
7 said, you've not even submitted in limine. I don't see that
8 happening.

9 MR. WEINGARTEN: May I have one minute with counsel?

10 THE COURT: Sure.

11 (Pause)

12 THE COURT: Is the expectation still a three-week
13 trial, Mr. Denton?

14 MR. DENTON: Yes, your Honor.

15 MR. WEINGARTEN: I think that is accurate. So
16 suggestion: How about we schedule everything but the trial.
17 Mr. Heberlig's defendant is Huawei. That is an over -- that is
18 a very complicated overall situation. It could be affected by
19 a thousand different things. I think we'll know relatively
20 soon. If we know that Mr. Heberlig's trial is not going to
21 happen in January, that's great. Mr. Heberlig is incredibly
22 important to this. I want to try the case with him. If his
23 trial goes, we'll so report and then we move it to the spring.
24 We schedule everything else and we let you know immediately
25 whether there is clarity on our part and then the alternatives

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1 would either be January or in the spring.

2 THE COURT: What do you imagine is the timing for
3 knowing?

4 MR. WEINGARTEN: It's so unpredictable. The Huawei
5 thing is affected by so many difference things. It could be
6 this afternoon. You can give us a deadline. If we don't meet
7 the deadline with a resolution, then it's after Mr. Heberlig's
8 trial.

9 THE COURT: Do you have a view, Mr. Denton, or are you
10 stretching?

11 MR. DENTON: Your Honor, I think we would prefer that
12 the Court set a trial date. If there were a scenario that
13 allowed us to all come back and ask to try to do something
14 sooner, we're certainly not going to oppose that. I think
15 we're in a tough situation to go to witnesses who we have been
16 telling October and say it is going to be some time but we
17 don't know when. We would prefer to have something on the
18 calendar.

19 THE COURT: I am a believer in setting firm trial
20 dates and not moving them. That is my practice. I set
21 realistic dates. I will move heaven and earth to get to it as
22 soon as we can. The case has to be trial-ready. I am not sure
23 what is gained. In my experience waiting to set a trial date
24 only delays one trial it gets set for because in the meantime
25 other things start occupying the calendar.

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1 MR. WEINGARTEN: Perhaps the solution is a short time
2 frame for us to get back to the Court. Every day different
3 things happen in Huawei that could dramatically affect this. I
4 am being completely realistic about this trial being affected
5 by external events and then we have the trial in January as
6 apposed to May, which I think will benefit everybody.
7 Otherwise, I guess the solution would be to set the trial deep
8 in the spring and there is a realistic alternative. If you
9 gave us until Labor Day, I am not sure how people would be
10 prejudiced by that. We have everything else scheduled.

11 THE COURT: If we were to go in January, we're talking
12 about starting January 6th.

13 MR. WEINGARTEN: That's fine.

14 THE COURT: Let's just work backwards from there.
15 There is any reason not to stay on the same pretrial schedule
16 with respect to -- Judge Carter had you briefing the in limines
17 and the other pretrial materials throughout October. I suppose
18 one question is is resolution of the pending motions critical
19 to what you are going to file with respect to your in limines?

20 MR. WEINGARTEN: Yes.

21 MR. DENTON: Also with respect to what we expect will
22 be contested litigation as to privilege issues.

23 Just with respect to the in limine schedule, your
24 Honor, I think given the holidays if you were inclined to start
25 setting a schedule, we might want to push the dates a little

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1 earlier in December so that we can have things briefed before
2 the holidays.

3 THE COURT: Assuming I can resolve the pending
4 motions, and set aside the privilege issues for a moment
5 because I haven't fully gotten my head around that process, if
6 I can resolve the pending motions by October in October at some
7 point if the briefing on the in limines happens in November,
8 then briefing throughout November would give me December --
9 happy holidays to me -- to resolve the in limines. That's the
10 basic schedule we're talking about.

11 MR. WEINGARTEN: Can I ask for one clarification
12 question. Am I correct that the January 6th date is assuming
13 that the Huawei trial gets pushed or disappears?

14 THE COURT: Well, my preference would be to set it for
15 March. You are saying you would like to go in January if could
16 co-counsel's schedule permits.

17 MR. WEINGARTEN: Mr. Heberlig's trial is in March. So
18 he couldn't be here under any circumstances if the trial goes.

19 THE COURT: So the January concern is foreign
20 discovery.

21 MR. WEINGARTEN: I guess my hope would be that you
22 gave us a firm date to report to the Court whether or not we
23 cleared our decks for January the 6th and if we have not, then
24 we set the schedule consistent with that. I think it will
25 work. I don't know if there is a two-week lag that anyone --

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1 THE COURT: That is what you are talking about a week
2 or two to resolve?

3 MR. WEINGARTEN: Yes.

4 THE COURT: I really don't think it could take much
5 longer then. I suppose what I am going to suggest is we set
6 the Curcio hearing for something like a week or two -- time in
7 a week or two. You have to talk to J P Morgan and work through
8 some issues, and then we come in to that proceeding with
9 counsel having met and conferred and having resolution on
10 Mr. Heberlig's schedule and you'll propose trial dates at that
11 point.

12 I think January is the earliest it could possibly
13 happen in order to be trial-ready and it would be pushing it.
14 I am not going to hold that date and operate because the Court
15 is going to kick into resolving -- the motions need to be
16 resolved anyway.

17 MR. WEINGARTEN: Okay.

18 THE COURT: I am not a believer in having fully
19 briefed motions sitting around too long. So we'll get to them.
20 To keep three weeks on the calendar, it is a lot of real
21 estate. I will put off for two weeks.

22 MR. WEINGARTEN: Yes. That would be fine.

23 THE COURT: Mr. Denton.

24 MR. DENTON: Your Honor, I have no problem with that.
25 I do think that date would require everything to happen without

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1 any hiccups. If defense would like to hold that and go through
2 this, that is fine. They are the ones who have indicated that
3 they are likely to make a motion with respect to privilege.
4 They are the ones who made an additional *Wey* motion in their
5 reply brief. Some of this is a little bit within their control
6 in terms of how much has to get done before then.

7 THE COURT: Everything always needs to get done.

8 MR. DENTON: That's is true.

9 THE COURT: My chambers motto is the human heart works
10 on deadlines. So if we have our foot on the gas like trial is
11 going to happen in January and it happens -- sounds like it
12 wouldn't happen in March -- then I am not sure what the
13 downside to that is. But because the human heart works on
14 deadlines, I want to set a realistic trial date and then not
15 move it. That is how things in my experience progress forward.

16 So I am not going to set a trial date at this time.
17 We have our eyes on January 6th as a potential trial date,
18 which may be enough to get the case trial-ready, but it will be
19 close. We'll wait to hear whether the defense is interested in
20 that date or not.

21 If we're not look at January 6th, Mr. Weingarten, what
22 are we looking at?

23 MR. WEINGARTEN: I missed that last thing. When
24 should we have the Curcio hearing?

25 THE COURT: No. I am curious if you think January 6th

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1 is not a good date to proceed, what are you likely to propose?

2 MR. WEINGARTEN: Again, it turns entirely on
3 Mr. Heberlig's trial. I very want to try the case with him. I
4 think that is clearly in the client's interest. His trial I
5 think will be about three or four weeks and then we're talking
6 about May.

7 MR. HEBERLIG: It could be closer to five or six
8 weeks, but I still think we can do May. We have foreign
9 witness translators. It is a complicated matter, but May will
10 be safe.

11 THE COURT: I can give you May. It's wide open.
12 We'll set a final firm trial date in two weeks. We'll
13 have our Curio hearing on --

14 MR. WEINGARTEN: Could I make a suggestion on that?

15 THE COURT: Just a second.

16 MR. WEINGARTEN: I have something here in New York on
17 the 5th and 6th of September. If it is possible for to us
18 squeeze it in then, that would be great.

19 THE COURT: I will not be here. I can do the 9th.
20 Spend the weekend.

21 MR. WEINGARTEN: The 4th.

22 THE COURT: You are moving in the wrong direction.

23 MR. WEINGARTEN: The 9th. Did someone suggest the
24 9th?

25 THE COURT: That's a good idea. I can do it in the

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1 morning or the afternoon. The morning at 10:00 or 2:00?

2 MR. WEINGARTEN: See you at 10:00.

3 THE COURT: Okay.

4 Mr. Denton?

5 MR. DENTON: That's fine for us, your Honor.

6 THE COURT: So we'll set our hearing for 10:00. I
7 would like to hear from counsel by joint letter by
8 September 2nd hopefully with a joint proposal as to how to
9 proceed with respect to everything, including the question of
10 written waiver from J P Morgan, proposed script for the Curcio,
11 and the question of unconflicted trial counsel.

12 MR. DENTON: We can do that, your Honor.

13 THE COURT: That takes care of the Curcio hearing.

14 So talk to me about the privilege issue.

15 MR. DENTON: So there are two nested issues. The
16 overall privilege issue is that there are unquestionably within
17 the search warrant returns obtained by the government
18 privileged material that contain attorney-client privilege
19 communications. There are also, which is not uncommon, a set of
20 contested communications as to which the government believes
21 either that there is no privilege or to the extent there is
22 one, the crime fraud exception would apply. That would
23 normally be a fairly straightforward matter. It is the
24 defendant's burden. He would make a motion to a certain
25 privilege. We would respond and the Court could proceed

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1 accordingly.

2 A felter team on the government's side has been
3 handling the discovery. The prosecution team hear can see
4 something of all 500 emails at this point. The reason why I
5 say there is a nested issue is that the defendant has, like I
6 said, in his reply briefing on the motion for return of
7 property asserted that the government should only be able --
8 any lawyer on government team including the filter lawyers
9 should only be allowed to look at one subset of documents
10 contained in one government discovery production, and they made
11 a *Wey* motion in their reply brief asking the Court to order
12 that.

13 We did not respond to a motion made in the first
14 instance in our reply brief. They have now taken the position
15 with us that the filter team should not be reviewing anything
16 else for privilege. So the privilege review has -- I wouldn't
17 say it is halted, but it has certainly slowed significantly and
18 slowed while we sort that issue out.

19 In the first instance there is the defendant's return
20 of property motion. In the second instance there is the
21 question of whether there should be a motion at all with
22 respect to what emails the government can review if it can
23 retain this property. We would obviously want a chance to
24 respond to that both on the merits but also where respect to
25 what the appropriate universe should be if the Court were

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1 inclined to limit it.

2 Once we have settled those questions, then the
3 defendant can make a motion claiming privilege with respect to
4 certain of the documents that remain which the Court can
5 address.

6 THE COURT: Okay. So, Mr. Denton, your position would
7 be once I resolve the return of property motion, we then deal
8 with scheduling briefing on the issues?

9 MR. DENTON: Yes. I think assuming that the Court is
10 inclined to allow them to make essentially a secondary
11 application for relief essentially precluding the government
12 from reviewing additional emails --

13 THE COURT: And the basis for not allowing that motion
14 would be what, that it is untimely, or what?

15 MR. DENTON: Essentially, yes. I am assuming that the
16 Court would likely give them leave to make that application.

17 THE COURT: Fair assumption.

18 MR. DENTON: We would then need a schedule for that.
19 The government would obviously want to be heard on the
20 question.

21 THE COURT: Why don't we set a schedule now.

22 MR. DENTON: We can certainly can do that, your Honor.

23 THE COURT: What would you propose?

24 MR. DENTON: Recognizing the possibility that it could
25 be mooted if the Court were to grant their motion for return of

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1 property, I think if the defendant wants to make the
2 application in the first instance, however much time they want,
3 we'll take two weeks to respond. If the Court warrants proceed
4 by just having us to respond to the last few pages of their
5 brief, we can probably do that in a couple weeks as well.

6 THE COURT: Mr. Heberlig.

7 MR. HEBERLIG: Thank you, your Honor.

8 I think this is far more straightforward than
9 Mr. Denton is portraying. We didn't file a separate motion
10 with our reply brief. The government opposed our motion for
11 return of property, which asked to the return of all emails the
12 government had seized that were not pertinent. We received
13 much earlier in discovery the pertinent documents and then
14 proceeded accordingly. When we filed that motion asking for
15 the return of the nonpertinent emails, the government's
16 opposition represented that there is no need to return those
17 emails because we the government are not searching or accessing
18 those nonpertinent documents.

19 So what we said in reply is we believe that return is
20 warranted, but if the Court is okay with the government
21 maintaining possession because they said they needed it for
22 purposes of authenticity, which I don't think is a real issue,
23 and we can stipulate to, but in any event if the Court agreed
24 then at a minimum they needed to precluded from reviewing those
25 nonpertinent unconstitutionally obtained emails. It wasn't a

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1 new motion by an respect.

2 The government did not respond to our motion seeking
3 return of the nonpertinent emails saying, Well, in fact there
4 are a bunch of the other pertinent emails that we do believe we
5 have access to. We never heard that until a call last week
6 that we had with the government where we understand now there
7 may be a position on the part of the government that the
8 officers who executed the search warrant deemed some other
9 universe of documents pertinent that we never heard of and have
10 not been represented in the 18 months this case has sat around
11 as discovery that the prosecution team has access to. So it is
12 all teed and briefed. I don't think there is any further need
13 for a briefing schedule.

14 MR. DENTON: Briefly on this. I think there are
15 obviously two very different issues between whether the
16 government is allowed to retain property and whether the
17 government is allowed to examine the retained property. The
18 claim in the first instance was the government shouldn't have
19 this at all. We represented accurately in that that the
20 prosecution team had not been reviewing material and had not
21 been searching for additional documents. That certainly is not
22 to say that the government is limited in its ability to search
23 for documents responsive to an appropriately specific warrant.
24 I think that is an issue that we would have to address.

25 Obviously the Court nose this was something that took

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1 a lot of briefing and a lot off different issues in *Wey*. I am
2 not suggesting we would be in that kind of territory here. We
3 don't have a lot of those issues. Also in describing what is
4 pertinent, defense counsel has chosen to select one production
5 of discovery that was made to predecessor counsel as the
6 universe of pertinent documents. We would certainly want to
7 provide the Court with information about when and how certain
8 of the documents that have been produced to the defense in
9 discovery were identified as pertinent.

10 So I think there is a separate issue over what the
11 universe should be if the Court is inclined to grant this
12 limitation. I think there are some issues that would need be
13 to addressed here.

14 MR. HEBERLIG: We didn't decide on our own what the
15 universe was. They were produced by the government and
16 represented to be the pertinent nonprivileged documents. We
17 have discovery letters that we can happy and easily provide to
18 the Court. The suggestion that five years after a search
19 warrant has been executed the government can now conduct
20 searches to determine what was responsive to the warrant is
21 completely inaccurate and inconsistent with the Court's ruling
22 in *Wey*. That is just not allowed.

23 THE COURT: Why don't I read the briefs. Depending on
24 whether I want more briefing on the issue in light of what has
25 been teed up in the responses or following resolution of that

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1 need more briefing, we'll set a schedule.

2 MR. DENTON: That's fine. Your Honor, to the extent
3 that any additional exhibits in terms of the discovery
4 communications would be helpful, we can provide that separate
5 from any briefing schedule as well.

6 THE COURT: All right. I think to be honest depending
7 on how this goes, January may not be totally realistic; but as
8 I say, there is no harm in acting as though at least now that
9 that is a likely possibility.

10 So we set our Curcio. We will set the schedule on the
11 remaining pretrial materials once we set our trial date; but if
12 we're looking at January, then I think the existing schedule
13 would be pushed off by a month so that I have got full briefing
14 on pretrial materials by November. To the extent I can get
15 those resolved quickly so you have that guidance in advance of
16 trial, all the better.

17 What else?

18 MR. DENTON: Nothing further from the government, your
19 Honor. We would note that time was already excluded through
20 the October trial date. So I don't think we need to address
21 that now and we can take it up further on the 9th.

22 theco: Mr. Weingarten.

23 MR. WEINGARTEN: I am not clear on when we should
24 advise you as to the status of the Huawei situation. Can it
25 await when we have the privilege of next being in court?

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1 THE COURT: So you are going to submit a letter on the
2 Curcio on September 2nd so it should be included in that.

3 MR. WEINGARTEN: September 2nd is Labor Day. So maybe
4 September 3rd?

5 THE COURT: Yes, September 3rd.

6 Anything else?

7 We're adjourned.

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